MALAYSIAN REPORTS

UMBC Finance Ltd v Woon Kim Yan Robin

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-64 OF 1990
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND AJAIB SINGH SCJJ
20 SEPTEMBER 1990

Civil Procedure — Affidavit evidence — Affidavit of witness who has since died — Application for leave to read affidavit — Discretion of court — Highly contentious evidence should not be so admitted — Rules of the High Court 1980, O 38 r 2

In this case the defendant-respondent had applied to read the affidavit of a witness who was a witness who had been subpoenaed for the trial but who has since died. The application was made under O 38 r 2 of the Rules of the High Court 1980. The application was allowed by the learned judicial commissioner and the appellant appealed. It was obvious in this case from the nature of the claim and the nature of the evidence sought to be adduced in the affidavit that the evidence sought to be admitted was highly contentious.

Held, allowing the appeal:

(1) Under O 38 r 2, a wide discretion is given to the court at or before a trial began by writ whether the court should make an order that the affidavit of any witness may be read at the trial. The rule clearly says that the court may exercise the discretion according to the circumstances of the case and whether it is reasonable to make such an order.

(2) An order under O 38 r 2 should not be made if the evidence is strongly contested or where the evidence relates closely to the credibility of the witness or where by its very nature the evidence needs to be examined closely and its very admissibility is yet to be determined.

(3) It is not a proper exercise of the discretion of the court to allow evidence under O 38 r 2 where the evidence is highly contentious and its admissibility is in issue.

[Bahasa Malaysia summary

Di dalam kes ini defendan-responden telah memohon dibenarkan membaca afidavit seorang saksi yang telah disepina untuk perbicaraan tetapi telah meninggal dunia sebelum perbicaraan itu. Permohonan dibuat di bawah A 38 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980. Permohonan itu telah dibenarkan oleh pesuruhjaya kehakiman dan perayu telah membuat rayuan. Adalah jelas di dalam kes ini dari jenis tuntutan yang dibuat dan jenis keterangan yang hendak diberi melalui afidavit itu bahawa keterangan itu adalah sangat dipertikaikan.

Diputuskan, membenarkan rayuan:

(1) Di bawah A 38 k 2 budibicara yang luas diberi kepada mahkamah semasa atau sebelum perbicaraan yang dimulakan dengan writ samada mahkamah itu hendak membuat perintah supaya afidavit seorang saksi dibaca di perbicaraan itu. Kaedah itu dengan nyata menjelaskan bahawa mahkamah boleh menggunakan budibicaranya mengikut keadaan kes itu dan samada munasabah perintah itu dibuat.

(2) Perintah di bawah A 38 k 2 tidak seharusnya dibuat jika keterangan itu kuat dipertikai atau di mana keterangan itu berhubung rapat dengan kebolehpercayaan seorang saksi atau di mana dari keadaannya sendiri keterangan itu perlu diteliti dengan cermat dan kebolehterimaannya belum lagi diputuskan.

(3) Tidaklah boleh dikatakan budibicara mahkamah itu telah digunakan dengan baik jika keterangan dibenarkan di bawah A 38 k 2 di mana keterangan itu adalah sangat dipertikaikan dan kebolehterimaannya menjadi isu.]

Cases referred to

1 *Schuler AG* v *Wickman Machine Tool Sales Ltd* [1974] AC 235 (refd)
2 *Bank of Australasia* v *Palmer* [1897] AC 540 (refd)

Legislation referred to

Rules of the High Court 1980 O 38 r 2

Appeal from: Civil Suit No 181 of 1976 (High Court, Malacca)

Ngeh Koo Ham for the appellant.
K Gunaretnam for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): This was an appeal against the decision of the learned judicial commissioner, Malacca who allowed an application by the defendant in a civil suit for leave to read the affidavit of one Kang Kok Seng who was a witness subpoenaed for the trial but who has since died. We allowed the appeal with costs.

The main suit, Civil Suit No 23-181 of 1976, commenced with the issue of writ by the appellant bank as plaintiff to recover a certain sum of money from the respondent pursuant to a letter of guarantee executed between them.

The defendant/respondent, Robin Woon Kim Yan is the defendant in the suit pending for hearing in the High Court of Malacca. For some reason known only to the learned judge concerned and counsel for the parties in the suit, the hearing of the suit was postponed on numerous occasions. Finally on 9 December 1988, the defendant/respondent applied by summons-in-chambers seeking for an affidavit of the said Kang Kok Seng affirmed on 11 May 1981 to be 'admitted as evidence in the proceeding'. The application was made under O 38 r 2 of the Rules of the High Court 1980 and the affidavit in support stated that the claim against the defendant/respondent was for a sum of $465,000 in Malaysian ringgit and interest thereon pursuant to a guarantee. The affidavit reiterated what was pleaded in the statement of defence that the bank had verbally agreed that the guarantee was to be withdrawn as soon as the debenture over all the assets of the company was executed. The said Kang Kok Seng (now deceased) was said to have made a verbal undertaking on behalf of the bank on 7 November 1970 when he was director of the bank and confirmed it by a letter subsequently.

It is obvious from the nature of the claim and the nature of the evidence sought to be adduced in the affida-

vit referred to in the summons-in-chambers that the evidence sought to be admitted was highly contentious. The application was made under O 38 r 2 of the Rules of the High Court 1980 and for the purpose of this appeal it is best to see the scope and object of the rule.

Since the claim is based on a guarantee, the liability of the guarantor will depend very much on the language of the instrument and among other things the appellant is entitled to rely on the rule reiterated in *Schuler AG* v *Wickman Tool Machine Sales Ltd*[1] at p 261:

> The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used.

It is an old principle echoed by Lord Morris in *Bank of Australasia* v *Palmer*[2] (at p 545) that '... parole testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract'.

Evidence in the nature sought to be admitted in the said affidavit is only admissible on the terms of s 92 of the Evidence Act 1950 dealing with the admissibility of oral evidence or statement where there is a contemporaneous or collateral separate oral agreement on which a document is silent. The admissibility should be determined at the trial, not at an interlocutory stage such as this. Order 38 r 2 deals with a procedure of admitting affidavit evidence and does not deal with admissibility of the evidence.

Under O 38 r 2 a wide discretion is given to the court at or before a trial begun by writ whether the court should make an order that the affidavit of any witness may be read at the trial. The rule clearly says that the court may exercise the discretion according to the circumstances of the case and whether it is reasonable to make such an order.

Order 38 r 2 is taken from the equivalent English rule. This rule is used normally for a witness who is abroad and therefore not available for the trial or where the evidence is uncontested. An order under O 38 r 2 should not be made if the evidence is strongly contested, or where the evidence relates closely to the credibility of the witness, or where by its very nature the evidence needs to be examined closely and its very admissibility yet to be determined.

In our view it is not a proper exercise of discretion to allow evidence under O 38 r 2 where the evidence is highly contentious and its admissibility is in issue.

Appeal allowed.

Solicitors: *Nga Hock Cheh & Co; Sault & Co.*

Reported by *Prof Ahmad Ibrahim*

Kwality Textiles (Malaysia) Sdn Bhd v Arunachalam & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-50 OF 1990
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
11 SEPTEMBER 1990

Companies & Corporations — Transfer of shares in company — Absolute discretion of directors to register transfer of shares — Articles of association of company

In this case the respondents had applied to have their names registered as owners of certain shares which had been transferred to them. At the time of the transfer of the shares the respondents were already owners of other shares in the company and were therefore members of the company. The directors of the company refused to register the transfer in exercise of their discretion under art 44(1) of the articles of association of the company. The respondents applied to the High Court for rectification of the register of members of the company by having their names registered as owners of the shares. The learned judge of the High Court ruled in favour of the respondents [see [1990] 2 MLJ 167], holding that the said art 44(1) has no general application and in particular has no application to a transfer from a member to another member.

Held, allowing the appeal:
In this case the discretion given by the article is by its language absolute. The court should not interfere with the proper exercise of discretion by the board of directors conferred by the articles of association to refuse registration for the well-being of the company. Indeed the court should be slow to question the exercise of the discretion in the absence of evidence that the board of directors had acted mala fide.

[Bahasa Malaysia summary

Di dalam kes ini responden-responden telah membuat permohonan supaya nama mereka didaftarkan sebagai pemunya saham-saham yang telah dipindahkan kepada mereka. Pada masa pemindahan itu mereka adalah pemunya saham-saham lain di dalam syarikat itu dan oleh kerana itu adalah ahli syarikat itu. Pengarah-pengarah syarikat itu telah enggan mendaftarkan pemindahan itu dengan menjalankan budibicara mereka di bawah perkara 44(1) perkara-perkara persatuan syarikat itu. Responden-responden telah memohon kepada Mahkamah Tinggi mendapat pembetulan daftar ahli syarikat itu dengan mendaftarkan nama mereka sebagai pemunya saham-saham itu. Hakim Mahkamah Tinggi telah membuat keputusan bagi responden-responden [sila lihat [1990] 2 MLJ 167], kerana beliau berpendapat perkara 44(1) yang tersebut itu tidak boleh dipakai secara am dan khususnya ia tidak dipakai mengenai pemindahan dari seorang ahli kepada ahli lain.

Diputuskan, membenarkan rayuan:
Di dalam kes ini budibicara yang diberi oleh perkara itu adalah mengikut perkataannya mutlak. Mahkamah tidak seharusnya mengganggu penggunaan dengan cara yang betul oleh lembaga pengarah budibicara yang diberi oleh perkara-perkara persatuan untuk enggan mendaftarkan pemindahan demi kebaikan syarikat itu. Sesungguhnya mahkamah hendaklah berhati-hati menyoal penggunaan budicara itu tanpa apa-apa keterangan yang menunjukkan lembaga pengarah itu telah bertindak mala fide.]